
The committee has sought further comment in relation to the following instruments

Commonwealth Scholarships Guidelines (Education) 2013

FRLI: F2013L02070

Portfolio: Education

Tabled: House of Representatives and Senate, 12 December 2013

Summary of committee concerns

2.1 The committee seeks further information on the impact of the proposed changes on the right to education and, to the extent that the instrument may involve a limitation on that right or a retrogressive measure, a clear statement of justification for the changes. The committee also seeks further information as to the compatibility of the instrument with the right to equality and non-discrimination.

Overview

2.2 Under the *Higher Education Support Act 2003*, the Minister may make Commonwealth Scholarship Guidelines to give effect to matters under the Act relating to Commonwealth Scholarships.¹

2.3 This instrument revokes the *Commonwealth Scholarships Guidelines (Education) 2010* (the former Guidelines) and makes new guidelines to replace them. The new Guidelines implement the 'efficiency dividend' to university funding of 2 per cent in 2014 and 1.25 per cent in 2015 announced by the previous government on 13 April 2013 and included in the 2013-14 Budget. The new Guidelines also set out Indigenous Commonwealth Scholarships separately from other Commonwealth Scholarships.

Compatibility with human rights

Statement of compatibility

2.4 The statement of compatibility accompanying the instrument states that the instrument engages and promotes the right to education.²

2.5 The statement of compatibility also states that the instrument 'engages the right to equality and non-discrimination as it specifies the Indigenous Commonwealth Scholarships Program and the Indigenous Staff Scholarships Program'.³

1 *Higher Education Support Act 2003*, section 238-10 at item 3.

2 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3 See article 2(2) of the ICESCR and articles 2, 16 and 26 of the International Covenant on Civil and Political Rights.

2.6 The statement concludes that the instrument is compatible with human rights.

Committee view on compatibility

Right to education

2.7 The statement of compatibility states that:

[t]he Guidelines provide for Scholarships to support students and staff while they are undertaking study. To the extent that the right to education is engaged this is promoted as it increases access to education.⁴

2.8 The committee agrees that, overall, the Commonwealth Scholarships program under the Higher Education Support Act promotes the right to education. The committee also agrees that, to the extent that the instrument furthers the implementation of this program, the instrument also promotes the right to education. However, the committee notes that one of the purposes of this instrument is to implement the 'efficiency dividend' for higher education funding, which involves overall cuts in funding to that sector.

2.9 According to the statement of compatibility, 'the changes are not expected to have any impact on individuals' access to education'.⁵ The statement also states that:

[t]he effect of the efficiency dividend will not effectively reduce the numbers of Indigenous staff and students accessing these scholarships as funding will continue to rise, albeit at a slower rate.⁶

2.10 According to the explanatory statement accompanying the bill, the 'efficiency dividend' will be applied to the amount of the grant and the reduced amount will then be indexed.⁷

2.11 It is not clear whether the implementation of the efficiency dividend under the instrument will result in a reduction in the overall funding available for Commonwealth scholarships and the number of scholarships. To the extent that this instrument may result in a reduction of funding or numbers of scholarships, the measure may be either a limitation on the right to education or a retrogressive measure.

2.12 Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the rights guaranteed in the Covenant, such as the right to education, may be limited but only by:

4 Statement of compatibility, p 2.

5 Statement of compatibility, p 2.

6 Statement of compatibility, p 2.

7 Explanatory statement, p 2.

such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

2.13 Our predecessor committee noted that retrogressive measures affecting economic, social and cultural rights have to be clearly justified:

A deliberate retrogressive measure has been described to mean any measure which implies a backwards step in the level of protection of ICESCR as a consequence of an intentional decision by the state and includes an unjustified reduction in public expenditure in the absence of adequate compensatory measures aimed to protect the affected individuals. Deliberate retrogressive measures are not prohibited per se under international human rights law but will require close justification, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or by other factors.⁸

2.14 If the application of the efficiency dividend under the instrument will result in a reduction of funding available for Commonwealth scholarships, it is necessary for the government to demonstrate that the measure pursues a legitimate objective and there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

2.15 The statement of compatibility does not address these matters. The committee expects that where funding cuts are made, the statement of compatibility should provide an assessment of the practical impact on the rights in question, including relevant justification where such rights will be limited.

2.16 The committee intends to write to the Minister for Education to seek further information as to:

- **whether the implementation of the efficiency dividend will result in a reduction of funding for Commonwealth scholarships or a reduction in the number of scholarships available; and**
- **if so, how any reduction is reasonable, necessary and proportionate to achieving a legitimate objective.**

Right to equality and non-discrimination

2.17 As set out above, the statement of compatibility notes that the separation of Indigenous Commonwealth Scholarships from other Commonwealth Scholarships engages the right to equality and non-discrimination. The statement states that:

8 PJCHR, *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012, Final Report, Fifth Report of 2013*, pp 16-17.

[t]o the extent that the right is engaged, it promotes the right to self-determination as Indigenous staff and students are provided with funding which will assist them to participate in higher education.⁹

2.18 The committee agrees that, overall, the provision of funding to Indigenous staff and students under the Indigenous Commonwealth Scholarships program promotes the rights of Indigenous persons. However, the purpose of this instrument is to 'separate out Indigenous Commonwealth Scholarships from other Commonwealth Scholarships'.¹⁰

2.19 This measure engages the right to equality and non-discrimination because it constitutes a difference in treatment between persons or groups on the basis of a prohibited ground, namely race. However, such a difference in treatment will not constitute prohibited discrimination where its purpose is legitimate, based on reasonable and objective criteria and proportionate to the objective to be achieved.

2.20 The statement of compatibility does not address whether the measure constitutes legitimate differential treatment. In particular, the statement of compatibility does not address why it is necessary to separate out Indigenous scholarships from other types of scholarships. Without knowing what the objective of the measure is, the committee cannot assess whether the measure is legitimate differential treatment.

2.21 The committee intends to write to the Minister for Education to seek further information as to:

- **what the purpose of separating out Indigenous scholarships and other scholarships in the new Guidelines is; and**
- **whether the separation is reasonable and proportionate to achieving a legitimate objective and therefore constitutes legitimate differential treatment consistent with the right to equality and non-discrimination.**

9 Statement of compatibility, p 2.

10 Explanatory statement, p 1.